

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON

WILMA USELTON, )  
 )  
 Plaintiff/Appellant, ) SHELBY COUNTY  
 )  
 VS. ) HON. GEORGE H. BROWN, JR.  
 ) JUDGE  
 )  
 CONWOOD COMPANY, LP, )  
 ) No. 02S01-9607-CV-00070  
 )  
 Defendant/Appellee. )

**FILED**

February 25, 1997

Cecil Crowson, Jr.  
Appellate Court Clerk

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**MEMORANDUM OPINION**

**MEMBERS OF PANEL:**

LYLE REID, JUSTICE  
JOE C. LOSER, JR., SPECIAL JUDGE  
CORNELIA A. CLARK, SPECIAL JUDGE

**AFFIRMED**

**CLARK, SPECIAL JUDGE**

This worker's compensation appeal has been referred to the special worker's

compensation appeals panel of the Supreme Court in accordance with Tenn. Code Ann. §50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. On appeal plaintiff contends the trial court erred in dismissing her complaint for benefits based on a prior settlement when the medical proof evidenced that she sustained a separate compensable injury.

The complaint in this action alleges that in December 1993 plaintiff sustained “injuries and/or aggravations of prior conditions to the left extremity and left elbow.” Defendant answered and contended that plaintiff’s action was barred based on a prior worker’s compensation settlement between these parties approved by a different judge on December 16, 1992. Oral argument of counsel was conducted in the trial court on March 12, 1996. The deposition of Dr. Tewfik E. Rizk and certain of his notes were provided to the trial judge, along with the pleadings from the prior case file. No other proof was presented. The trial court granted defendant’s oral motion to dismiss, finding that all matters in controversy between the parties had been resolved in the prior case. We affirm the judgment of the trial court.

Plaintiff is a female resident of Tipton County, who has been employed by the defendant, a manufacturer of tobacco related products, for several years as a stem picker and packer.<sup>1</sup> As a result of the repetitive nature of her work, in 1990 plaintiff began experiencing problems with her right shoulder and right hand. She first saw Dr. Dan Scott on October 29, 1990. He began treating her for problems with her right shoulder and her right and left wrists. In November 1990 plaintiff

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<sup>1</sup>No direct testimony about the plaintiff was ever presented in this case. The facts summarized here are derived from the pleadings, medical records, and/or briefs. Neither party has complied fully with T.R.A.P. 27(a)(6), which requires that all facts recited in the brief must be supported by appropriate references to the record. Many facts asserted by both parties in the briefs are not found anywhere in the record. This has made our review very difficult.

underwent a carpal tunnel release on her right wrist, a mechanical neurolysis of the right median nerve, and a resection of the transverse carpal ligament.

On February 25, 1991, plaintiff filed a complaint for worker's compensation benefits in case number 134143-8. The complaint alleged the presence of carpal tunnel syndrome in both wrists, and right shoulder problems.

In March 1991 Dr. Scott ordered an EMG on plaintiff's left side also. He apparently made a diagnosis of problems to the left extremity as well.<sup>2</sup>

In May 1991 plaintiff underwent surgery on her right shoulder.<sup>3</sup> In October 1991 she complained of numbness and pain in her left hand, both on the ulnar and median sides.<sup>4</sup> An EMG was performed, and plaintiff ultimately was referred to Dr. Stan Patterson.<sup>5</sup> In April 1992, Dr. Dan Scott advised defendant's claims representative by letter that plaintiff had sustained a fifteen (15%) permanent partial impairment which was related to her left upper extremity. That impairment

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<sup>2</sup>No deposition or formal report from Dr. Scott is found in the record. Copies of his office notes and correspondence are contained in the file for case 134143-8, filed by agreement as a supplement to the record in this court on November 4, 1996. As filed, pages 5 and 6 of his office notes appear to be missing. Thus, no information exists concerning plaintiff's treatment from March 8 to October 27, 1991. Plaintiff concedes in her brief that on March 21, 1991 Dr. Scott diagnosed plaintiff with ulnar neuropathy of the left elbow, and ulnar nerve entrapment secondary to chronic repetitive flexion and extension of her elbow at work. This diagnosis was based on the results of an EMG ordered by Dr. Scott. The diagnosis is not found in the record. However, the results of the EMG performed on March 13 are included.

<sup>3</sup>This information does not come from Dr. Scott's notes; chronologically, it falls within the time frame for which his notes are missing. However, plaintiff provided this information to Dr. Rizk, and it was not disputed by either party.

<sup>4</sup>Concerning plaintiff's left extremity problems, nothing is mentioned in Dr. Scott's notes until October 28, 1991, where it is designated "New Complaint". As noted in footnote 2, supra, certain pages of the notes are missing. However, it is undisputed that plaintiff contended in her February 1991 complaint that she had problems with both wrists. Dr. Scott's records also contain a copy of his January 8, 1991 letter to an insurance claim representative. The copy includes a handwritten annotation, apparently by plaintiff, that she had problems with both hands for four or five years.

<sup>5</sup>No information from Dr. Patterson was included in the record. Plaintiff also was treated by other doctors during this time, but their findings are not included in the record either.

translated to seven and one-half (7-1/2%) percent impairment to the body as a whole.

In December 1992 a settlement was entered into between plaintiff and defendant and its worker's compensation carrier in case 134143-8. It was approved by the court on December 16, 1992. This agreement relied on the findings of Dr. Dan Scott, attached as exhibits to the order. The settlement was approved based on an impairment rating of thirty (30%) percent to the body as a whole, to be paid on a structured basis. Medical coverage was left open for a period of two years from the date of entry of the order. The order specifically stated that plaintiff's injury resulted from the development of right ulnar nerve entrapment and impingement syndrome of the shoulder, and left carpal tunnel syndrome secondary to repetitive motion and use at work.

On November 4, 1993, plaintiff filed a motion in case number 134143-8 to amend and clarify the prior order, claiming that the order mistakenly referenced an injury to her left side. The statements made in her motion contradicted the prior medical reports of Dr. Scott, and were accompanied only by her own affidavit. In January 1994 defendants presented an affidavit stating that \$5,000.00 in medical benefits had been paid by them for treatment to plaintiff's left extremity since March 1991. They further asserted that payments continued to be made for left extremity treatment after the 1992 settlement. Defendant representatives also asserted that they would not have settled the case unless plaintiff's claims for injuries to both extremities were settled. After review of all affidavits, the circuit judge in that case denied plaintiff's motion to amend and clarify the order in the prior settlement. His order was entered March 1, 1994.

In September 1994, while medical expenses were still open under the prior order, plaintiff filed this new action for worker's compensation benefits from her employer under docket number 64686-2. She alleged that she had sustained new

injuries and/or aggravations of prior conditions to the left extremity and elbow. She had continued to work for the defendant throughout the intervening months.

The only medical evidence submitted in the second case was the deposition of Dr. Tewfik E. Rizk and his notes. Dr. Rizk first saw plaintiff on September 8, 1995 for a tingling sensation in both hands, pain in both upper extremities, and a painful right shoulder. She related that she had had right shoulder surgery in 1991. She told him she developed left upper extremity problems in early 1995 and had a left carpal tunnel syndrome release performed in April 1995.<sup>6</sup> His diagnosis was that plaintiff had bilateral post carpal tunnel syndrome, right shoulder post impingement surgery, and myofascial pain, probably myositis. Dr. Rizk testified that he had reviewed records provided to him by plaintiff which showed that she had been diagnosed as having problems on her left side for several years and had been diagnosed as having carpal tunnel syndrome on the left as far back as 1991.<sup>7</sup>

On the day the present case was set for trial, defendant made a preliminary motion to dismiss the case on the basis that all issues had been resolved in the previously-filed case. After arguments of counsel and a review of the record in both cases, the trial judge agreed with defendant's contention and dismissed the case.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. §50-6-225(e)(2). This tribunal is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government

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<sup>6</sup>No other evidence of these events is found in the record.

<sup>7</sup>It should be noted that Dr. Rizk's testimony on this issue is complicated somewhat by his obvious confusion, during part of the questioning, about whether certain questions pertained to right or left side problems. However, he clearly agreed that plaintiff had suffered left extremity problems as early as 1991.

of Sumner County, 908 S.W.2d 921 (Tenn. 1995).

The burden to establish each element of a workers' compensation claim is upon the employee claiming benefits. Oster v. Yates, 845 S.W.2d 215 (Tenn. 1992). One of these elements is establishing that an injury occurred during employment. Smith v. Empire Pencil Company, 781 S.W.2d 833 (Tenn. 1989). Another requires medical proof of causation. Tindall v. Waring Park Association, 725 S.W.2d 935 (Tenn. 1987). Further, a mere increase in pain from the aggravation of a preexisting condition does not constitute a new compensable injury. Cunningham v. Goodyear Tire & Rubber Company, 811 S.W.2d 888, 890 (Tenn. 1991).

Although not specifically addressed by either party, this court must determine the proper standard for review of the trial court's decision. If the oral motion made and granted is based on Rule 12.02(6) of the Tenn. R. Civ. P., then we are limited to consideration of the allegations in the complaint, and we must construe the complaint liberally in favor of the plaintiff, taking all the allegations of fact therein as true. Randolph v. Dominion Bank of Middle Tennessee, 826 S.W.2d 477, 478 (Tenn. App. 1991). If the trial court considered affidavits and other extraneous matters in making its determination, then the review of its decision must be based on the standard provided under Rule 56 for motions for summary judgment. Knierim v. Leatherwood, 542 S.W.2d 806, 808 (Tenn. 1976). Because it is clear that the trial court considered the deposition and notes of Dr. Rizk and the pleadings and notes of Dr. Scott from the prior case, we will review its decision to grant the motion to dismiss using the standard of review for Tenn. R. Civ. P. 56 motions. There must be no genuine issue with regard to material facts relevant to the claim or defense embodied in the motion, and the moving party must be entitled to judgment as a matter of law based on the undisputed facts. Byrd v. Hall, 847 S.W.2d 208, 211 (Tenn. 1993). Plaintiff appears to agree with this analysis, since her argument is based on Rule 56.

Defendants' motion is based on principles of res judicata and/or collateral estoppel. The doctrine of res judicata bars a second suit between the same parties on the same cause of action with respect to all the issues which were or could have been brought in a former suit. Wall v. Wall, 907 S.W.2d 829, 832 (Tenn. App. 1995). A plaintiff may not, by disclaiming or failing to present a particular fact or theory, preserve such fact or theory to be used as a ground for a second suit. McKinney v. Widner, 746 S.W.2d 699 (Tenn. App. 1987). The doctrine of collateral estoppel bars the same parties or their privies from relitigating in a second suit issues that were actually litigated and determined in a former suit. Dickerson v. Godfrey, 825 S.W.2d 692, 694 (Tenn. 1992). This doctrine does not apply to issues that were not necessary for the decision in the former case, Scales v. Scales, 564 S.W.2d 667, 670 (Tenn. App. 1977), or when the party against whom the preclusion is sought did not have a full and fair opportunity to litigate the issue in the prior suit. Morris v. Esmark Apparel, Inc., 832 S.W.2d 563, 566 (Tenn. App. 1991). One defending on the basis of res judicata or collateral estoppel must demonstrate that (1) the judgment in the prior case was final and concluded the rights of the party against whom the defense is asserted, and (2) both cases involved the same parties, the same cause of action, or identical issues. Scales v. Scales, 564 S.W.2d 667, 670 (Tenn. App. 1977).

Plaintiff's second lawsuit involved the same parties, the same cause of action, and the same issue regarding permanent impairment to her left extremity, which were considered and determined in her first lawsuit. Although they ultimately settled their first suit, both parties had full opportunity to litigate the issues. The medical proof in this record is woefully incomplete, but it is clear that plaintiff had experienced problems with her left extremity as far back as 1991. The judgment order in case number 143143-8 clearly reflects injuries to both plaintiff's right and left extremities. Dr. Scott's April 1992 letter confirms the left side impairment. Defendants made payments of \$5,000.00 for treatment for these earlier problems. Although Dr. Rizk's notes reference treatment by other physicians, their records

have not been presented. The medical testimony provided from Dr. Rizk by deposition does not support a diagnosis of a new and independent injury. On the record presented, we find that no genuine issue exists as to the material facts relevant to this issue. Defendants are entitled to judgment as a matter of law.

During oral argument counsel for plaintiff asserted that the original medical information provided by Dr. Dan Scott in case number 134143-8 was wrong. He stated that the doctor has since dictated a new letter making the corrections, and he argued that he should be permitted to amend his complaint and/or the proof to present this information. Counsel for defendants objected because the new report is dated more than one year after the original settlement in that case.

Plaintiff's motion to amend is denied. No authority has been cited granting us authority to permit this amendment at this time. This information does not constitute post-judgment facts under Rule 14, T.R.A.P., and was not filed in compliance with Rule 22.<sup>8</sup> Under Rule 13(c), T.R.A.P., we are prohibited from considering other facts outside the record. To the extent some error occurred in the findings made in case number 134143-8, that error would have to be corrected in the trial court by application under Rule 59 or Rule 60, Tenn. R. Civ. P. Such a motion was filed and denied, and no appeal has been taken.

The judgment of the trial court is accordingly affirmed. Costs on appeal are taxed to the plaintiff/appellant.

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CORNELIA A. CLARK, SPECIAL JUDGE

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<sup>8</sup>So far as we can tell, no written motion to amend has been filed. The proposed substitute letter is not part of the record.

CONCUR:

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LYLE REID, JUSTICE

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JOE C. LOSER, JR., SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE  
AT JACKSON

WILMA USELTON, ) SHELBY CIRCUIT  
 ) NO. 64686 T.D.  
 )  
 ) Plaintiff/Appellant, )  
 ) Hon. George H. Brown, Jr.,  
 vs. ) Judge  
 )  
 ) CONWOOD COMPANY, LP, ) NO. 02S01-9607-CV-00070  
 )  
 ) Defendant/Appellee. ) AFFIRMED.

**FILED**

**February 25, 1997**

**Cecil Crowson, Jr.**  
Appellate Court Clerk

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Appellant, and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 25th day of February, 1997.

PER CURIAM

(Reid, J., not participating)

